28784 SERVICE DATE - LATE RELEASE MARCH 2, 1998
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SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-33 (Sub-No. 112X)

UNION PACIFIC RAILROAD COMPANY—ABANDONMENT EXEMPTION—
IN LANCASTER COUNTY, NE

Decided: February 27, 1998

In this decision, we are denying a petition filed by Lincoln Lumber Company (LLC) to reopen our decision served December 3, 1997, in which we set the terms and conditions for its Offer of Financial Assistance (OFA) under 49 U.S.C. 10904 and 49 CFR 1152.27 to purchase a portion of Union Pacific Railroad Company's (UP) Lincoln Branch in Lincoln, NE. We are also denying a petition by the National Association of Reversionary Property Owners (NARPO) seeking to reopen the Decision and Notice of Interim Trail Use served September 24, 1997, in which we permitted UP to abandon a segment of its Lincoln Branch and imposed an interim trail use condition.

BACKGROUND

In the September 24 decision, we exempted UP from the prior approval requirements of 49 U.S.C. 10903 to abandon a 1.88-mile segment of its Lincoln Branch between milepost 494.76, near 10th Street, and milepost 492.88, near 33rd Street, in Lincoln, NE. The City of Lincoln, NE (City) had requested a public use condition under 49 U.S.C. 10905 and 49 CFR 1152.28 and an interim trail use/rail banking condition under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act) and 49 CFR 1152.29. The City indicated that it wanted to acquire the entire right-of-way to extend a trail, which it had already developed to the University of Nebraska (University) campus in Lincoln. UP had agreed to interim trail use for the portion of the right-of-way between 18th Street and 33rd Street. The carrier declined to agree to negotiate interim trail use for the portion between 18th Street and 10th Street because it intended to donate that portion to the University. We granted the exemption subject to the public use condition for the entire right-of-way and an interim trail use/rail banking condition for the portion of the right-of-way between 18th Street and 33rd Street.[1]

The exemption was scheduled to become effective on October 24, 1997. But, on October 3, 1997, LLC filed an OFA to purchase a portion of the segment between 19th Street, where the line connects with the Omaha, Lincoln & Beatrice Railway Company (OLB), and the west edge of 24th Street. A decision served on October 8, 1997, found that LLC was financially responsible and postponed the effective date of the exemption authorizing abandonment of the portion between 19th

[1] We noted that UP's intended donation of a portion of the right-of-way to the University would be consistent with the public use condition.

Street and 24th Street to permit the OFA process to proceed. The decision also provided that, before November 3, 1997, either party could request that the Board establish the terms and conditions for the sale of the portion of the line if no agreement was reached during negotiations. The exemption permitting abandonment of the remainder of the segment became effective on October 24, 1997.

On October 14, 1997, NARPO filed a petition seeking to reopen the September 24, 1997 decision and vacate the interim trail use/rail banking condition. UP and the City replied to NARPO's petition. We deferred ruling on NARPO's petition until the OFA process was completed.

On November 3, 1997, LLC requested that the Board establish the conditions and amount of compensation; UP replied to the request on November 7, 1997. In the December 3 decision, we set the fair market value of the portion at $300,947, consisting of $292,600 for land and $8,347 for the net salvage value of track and materials. In a letter filed December 8, 1997, LLC accepted the terms and conditions set in our December 3 decision, but noted that it intended to file a petition to reopen that decision. LLC also acknowledged that it would be bound by the terms and conditions unless modified as a result of its petition.[2] A decision served January 16, 1998, authorized LLC to acquire the segment between 19th Street and 24th Street, and dismissed the petition for exemption as to the segment between 19th Street and 24th Street, effective on the date the sale is consummated.

LLC filed its petition to reopen on December 23, 1997, claiming that material error occurred in setting the value of land comprising the right-of-way. UP replied on January 20, 1998.

In its petition to reopen our set terms decision, LLC alleges that material error occurred because UP was improperly permitted to increase the sales prices for comparative properties to reflect inflation and location in valuing UP's right-of-way at $1.60 per square foot. LLC further claims that a 10,650 square foot parcel that is not used or required for rail service should be excluded from the forced sale. LLC further asserts that the land values should be reduced to reflect a time-of-sale discount and property taxes. UP has replied in opposition to all of LLC's arguments.

DISCUSSION AND CONCLUSIONS

1. OFA Land Valuation Petition.

In its petition to reopen, LLC cites Iowa Terminal R. Co. v. ICC, 853 F. 2d 965 (D.C. Cir. 1988) (Iowa Terminal), to support its argument that "[t]here is no question of the right to appeal a final determination in the offer-of-financial assistance (OFA) phase of an abandonment proceeding."

[2] While LLC had offered to purchase the portion between 19th Street and 24th Street, it initially also agreed to acquire the 17,400 square foot portion of the right-of-way between 18th and 19th Street where OLB's track is located. In the December 3 decision, we noted that UP had excluded an adjoining 8,400 square foot parcel located east of 18th Street that LLC did not want to acquire.

LLC's reliance on Iowa Terminal is misplaced. That case holds that a right of appeal lies to the Federal appellate courts, because a decision of the Board setting terms and conditions is an administratively final action from which no one has a right to seek administrative review. In Buffalo Ridge Railroad, Inc.—Abandonment Exemption—Between Manley, MN and Brandon, SD, 9 I.C.C.2d 778 (1993) (Buffalo Ridge), at 779, the Board's predecessor, the Interstate Commerce Commission (ICC or Commission), said:

> The statute authorizing the Commission to establish a binding purchase price, 49 U.S.C. §10905(f)(2), and the regulations implementing it, 49 C.F.R.§1152.27(h)(7), do not provide for reopening of that decision. Our rules at 49 C.F.R. §1152.27 were adopted in Abandonment of R. Lines & Discontinuance of Serv., 365 I.C.C. 249, 261 (1981), where the Commission plainly stated that decisions setting terms for sale would not be subject to an administrative appeal and would be appealable only to the courts. The Commission explained that these decisions were intended by Congress to be final and that allowing appeals in these circumstances would introduce a delay that would be inconsistent with the statutory scheme (footnote deleted).

In Buffalo Ridge, however, the ICC did grant a limited reopening to correct a clear mathematical error, explaining:

> The Commission may, however, at any time on its own initiative, reopen an administratively final action of the Commission based on material error, new evidence, or substantially changed circumstances. See 49 U.S.C. §10327(g).

9 I.C.C.2d at 779.

Thus, consistent with prior precedent, we find that there is no right to an administrative appeal of a decision of the Board setting terms and conditions of sale in response to an OFA filed under current section 10904 of the statute. Rather, the decision whether or not to grant administrative review of such a decision lies within the Board's discretion. See 49 CFR 1115.3. Furthermore, we believe that the manifest intent of Congress to expedite proceedings under section 10904 precludes the Board from considering petitions to reopen in these cases on the same basis as they are considered in other Board proceedings. In Buffalo Ridge, as noted, the ICC limited its review to the correction of a mathematical error. We will therefore limit our review of appeals from OFA decisions to the correction of similar indisputable errors.

We set the value of the land in the right-of-way LLC is seeking to acquire based on the value determined by UP witness Dennis J. Knudsen, in his appraisal dated October 28, 1997. Mr. Knudsen valued the right-of-way at $355,000, based on a cost per square foot of $1.60. Mr. Knudsen's appraisal was based on the average cost per square foot of comparable sales on four properties that occurred in November 1994, December 1994, and March 1995. We accepted Mr. Knudsen's appraisal because it contained reasonable comparable sales, and had not been effectively contradicted by LLC. We further adjusted the real estate value to remove an assemblage premium.

Based on UP's appraisal, we valued the real estate at $292,600. Mr. Knudsen had previously appraised the real estate in the 1.88-mile segment on October 23, 1995. That appraisal was submitted with UP's exemption petition in this proceeding.

Inflation. In its petition, LLC points out that Mr. Knudsen's appraisal increased the value of the four comparable sale properties to reflect inflation from the dates of each sale to the present at 4% per year. LLC disputes this adjustment and asserts that Mr. Knudsen did not establish that the sale prices of land in the area had actually increased by 4% since the dates of sales of the comparable properties. LLC also asserts that the adjustment is inconsistent with Mr. Knudsen's verified statement dated May 28, 1997, which had been submitted with UP's exemption petition, in which he stated that: "Based on my general knowledge of land values in the Lincoln, Nebraska area, it is my opinion that there has been little appreciable increase or decrease in the value of the Property since October 1995." LLC contends that removing the 4% inflation factor would reduce average cost per square foot for the land to $1.44 and thereby reduce the land valuation by $29,235. UP responds that the 4% annual increase used by Mr. Knudsen may be characterized as "little appreciable increase" and thus is consistent with his prior statement.

LLC's claim fails to meet the extremely restrictive standards for obtaining discretionary review of a decision setting terms and conditions. Moreover, LLC's claim lacks merit under the material error standard we apply to ordinary petitions to reopen. LLC implies that UP has the burden of proof and has failed to meet it. The burden of proof in a petition to set terms and conditions lies with the petitioner—here, LLC. UP based its real estate valuations on sales in the area that took place in 1994 and 1995 and increased those valuations by 4% a year to make them comparable to the value of real estate in Lincoln today. LLC made no such adjustments, and LLC did not support its claim that the values did not increase at all in the past 3-4 years. As we and our predecessor, the ICC, have noted in many cases, "where both offeror and offeree have submitted acceptable appraisals and where it is impossible to determine which valuation is more accurate, we shall accept the figure submitted by the offeree-railroad." Chicago and North Western Transp. Co.-Abandonment, 363 I.C.C. 956, 961 (1981), aff'd sub nom., Chicago & North Western Transportation Co. v. ICC, 678 F.2d 665 (7th Cir. 1982). Absent specific evidence supporting the offeror's estimates and contradicting the rail carrier's estimates, the burden of proof standard requires acceptance of the railroad's estimates in forced sale proceedings. Conrail Abandonment In Chicago, IL, Docket No. AB-167 (Sub-No. 970N) (ICC served May 5, 1987).

LLC argues that UP's witness Knudsen undercuts his use of a 4% inflation factor by stating that there had been "little appreciable increase" in the value of real estate in Lincoln since 1995. A 4% increase is not inconsistent with such a statement.

Location. Mr. Knudsen's appraisal also increased the value of each of the comparable sales by a 5% location factor. In its petition, LLC contends that the 5% location factor is not justified, referring to a verified statement of Mr. James D. Jennings that it submitted with its request to set terms and conditions. Mr. Jennings had indicated that the right-of-way was located in the Malone census area of Lincoln. LLC alleges that the Malone area is the worst area of Lincoln and has the

highest percentage of families in poverty and the lowest average house valuations. LLC asserts that none of the comparable sales used by Mr. Knudsen involved property in the Malone district. LLC argues that Mr. Knudsen should have lowered the comparable sales prices to account for the right-of-way's inferior location rather than increasing the sales prices. Moreover, LLC contends that Mr. Knudsen failed to explain why the right-of-way is superior in location to the comparable properties he used or to the comparable properties cited by Mr. Jennings.

UP responds that Mr. Knudsen used comparable sales based on use of the properties as commercial or industrial properties. It claims that the income levels and home values of the neighborhood are not relevant because the property is being sought for commercial use or industrial use.

We are not persuaded that Mr. Knudsen's location adjustments to the comparable sale prices are not warranted. Mr. Knudsen's appraisal indicates that he has researched comparable sales in Lincoln and performed an on-site inspection, thereby demonstrating that he is familiar with property values in the area. Moreover, LLC has not submitted any contrary evidence relating to industrial/commercial values in the Malone area and other areas of Lincoln to support its contention. We, therefore, reject LLC's request to eliminate the location adjustment.

Land Area. LLC also contends that a 10,650 square foot parcel should be excluded from the portion it is seeking to acquire, claiming that the parcel will not be used or required for rail service. The area that LLC seeks to exclude is part of the 17,400 square foot parcel between 18th Street and 19th Street where OLB's connecting track is located. Apparently, OMB's track enters the right-of-way from the north, 180 feet west of 19th Street, and then curves in a southwest direction and then connects at 19th Street with the line LLC is seeking to acquire. LLC concedes that it must acquire a 6,750 square foot triangular shaped parcel where OLB's track is located, including an area 15 feet south of the track centerline, which, it alleges, is sufficient to provide clearance for trains. LLC contends that it should not be required to acquire the remaining 10,650 square foot triangular portion, located south of the OLM track, which, it alleges, is not necessary to provide rail service.

UP responds that the 10,650 square foot parcel that LLC seeks to exclude from forced sale would not be marketable, and that its value would be reduced because of its irregular shape and close proximity to the operating rail line.

LLC has not shown that reducing the land area of the right-of-way is warranted. In OFA proceedings, we do not favor and will closely scrutinize any offer to purchase less than the entire right-of-way of the railroad. We will not require the carrier to sell less than the entire width of the right-of-way if the carrier would be left with the liability of unwanted and unproductive land. The offeror has the heavy burden of showing that the carrier will be compensated for the diminished value of the real estate and must also show that the lesser amount of the right-of-way is sufficient for effective rail operations. Burlington Northern Railroad Company—Abandonment Exemption—In Snohomish County, WA, STB Docket No. AB-6 (Sub-No. 375X) (STB served Mar. 11, 1996); Boston and Maine Corporation and Springfield Terminal Railway Corporation—Abandonment and

Discontinuance of Service in Hartford County, CT, Docket No. AB-32 (Sub-No. 43) (ICC served Aug. 19, 1991).

LLC has not shown that UP would be compensated for the diminished value of the retained 10,650 square foot parcel or that the retained parcel would be marketable. Rather, it appears that UP would be left with an odd shaped parcel of real estate that it does not want, that it might not be able to sell, and that is located close to an operating railroad. This is contrary to the statutory intent that a carrier be justly compensated for the property taken through the OFA process. Nor has LLC satisfied its burden of showing that a reduced right-of-way will be sufficient for continued rail operations. The record lacks any evidence about rail operations over the connecting track. Also, the record lacks accurate maps or track charts showing the exact location of tracks in this parcel.

Discounts for time of sale and property taxes. LLC contends that the fair market value of land should be discounted to reflect a time of sale factor and property taxes. In LLC's view, the time of sale discounts should be considered administrative costs of sale to determine net fair market value of land, citing 49 CFR 1152.34(c)(1(iii). In our December 3 decision, we rejected, as unjustified, LLC's claim that the land value be discounted for a time of sale factor of 1½ years. LLC claims that our refusal to permit any discount for time of sale was error. Noting that UP had indicated that the land would be sold in 4 months, LLC now asserts that land values should be discounted for a 4-month time of sale factor, which it computes at 3%. LLC further contends that the base value of land should also be discounted to reflect property tax expenses for the 4-month delay to sell the property, which it computes at .82% of the land value.

UP responds that the discounts asserted by LLC are not administrative costs of sale to reduce the appraised market value of rail properties on the line. UP further notes that the December 3 decision rejected delay of sale discounts because of the strong interest by the City and an adjoining property owner in purchasing the right-of-way. UP indicates that this strong interest continues.

We reject LLC's assertion that a time of sale discount should be applied to reduce the land value of the portion it seeks to acquire. Through the OFA process, we are required to give the carrier the constitutional minimum value for the land. Under the law of eminent domain, constitutional minimum compensation for real estate is its appraised fair market value at the time of the taking. United States v. 50 Acres of Land, 469 U.S. 24, 29 (1984). The law of eminent domain does not allow the value of property at the time of the taking to be adjusted for inflation. United States v. 158.76 Acres of Land, Etc., 298 F.2d 559 (2d Cir. 1962). We follow the law of eminent domain in OFA proceedings for setting the fair market value of land. Thus, we reject the time of sale discount sought by LLC as being inconsistent with the law of eminent domain.

We have permitted certain expenses, such as real estate commissions and selling costs, to reduce the appraised value of the right-of-way land in determining fair market value, if these expenses are fully supported and explained. See 49 CFR 1152.(c)(1)(iii) (B). We reject, however, LLC's adjustment for tax expenses over an assumed 4-month sell-off period because, as stated

above, according to the law of eminent domain, we are to determine the fair market value of land at the time of the taking. We must, therefore, ignore costs incurred after such time.

Accordingly, we will deny LLC's petition.

2. Interim Trail Use.

NARPO claims that the interim trail use condition imposed in our September 24 decision does not conform with the requirements of the Trails Act that an abandoned right-of-way must be preserved intact for future rail service. NARPO asserts that, if UP donates a portion of the right-of-way to the University, the right-of-way would not be intact for future rail service. Allegedly, the record indicates that the donated property may be used for buildings, parking garages, or other improvements. NARPO reasons that, without the donated portion, UP would not have a viable connection with its main line if it restores service on other portions of the segment, and thus rail service could not possibly be resumed on the whole segment as the Trails Act envisions. In support, NARPO cites an unpublished decision in Belka v. Penn Central Corp., 74 F.3d 1240 (6th Cir. 1996) (Belka), holding that, under Michigan law, a railroad right-of-way is deemed abandoned and "impossible for use" as a trail where portions of the right-of-way had been sold or lost through condemnation.

UP replies that the Board decision properly imposed an interim trail use condition for the portion of the right-of-way between 33rd Street and 18th Street. UP asserts that the Trails Act and the Board's regulations[3] do not require that the entire line be preserved intact, but permit a potential trail user to acquire or use a portion of the length of the right-of-way. UP and the City further state that rail service could be reactivated on the portion of UP's right-of-way that is subject to interim trail use. UP indicates that it could negotiate trackage rights over OLB's line that connects with the Lincoln Branch at 19th Street. UP further states that, if LLC acquires the portion between the OLB connection and 24th Street for continued rail service through the OFA procedures, OLB will probably provide service over that portion. UP asserts that it could interchange traffic directly with OLB at 24th Street. UP and the City assert further that Belka was decided under Michigan law relating to right-of-way easements and would not apply to federal law or reversionary interests in Nebraska.

NARPO's objections to the trail use condition lack merit. The Trails Act and our regulations do not require that the entire length of a line segment be preserved for interim trail use. A trail use request can be approved for a portion of the length of a line. The NITU noted that UP agreed to negotiate an interim trail use/rail banking agreement for the portion of the line between 19th Street and 33rd Street; it did not agree to trail use for the portion it intended to donate to the University. We, in turn, imposed the trail use condition for the remainder of the segment between 18th Street and 33rd Street.

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[3] 49 CFR 1152.29(a)(1).

Apparently UP had used the portion to be donated to the University primarily to move overhead traffic and local traffic generated on the line to connect with its main line in Lincoln. However, as we indicated in the September 24 decision, UP had already agreed to reroute overhead traffic over other lines and to provide service to industries on the remainder of the segment using the connection with OLB's line at 19th Street. Thus, the donated portion would not be necessary for future rail service on the remainder of the line that was subjected to the trail use condition.

As noted in the September 24 decision, the trail use condition would be subject to an OFA agreement for sale for continued rail service. When LLC acquires the portion between 19th Street and 24th Street for continued rail use under the OFA procedures, that portion would not be subject to interim trail use. However, the trail use condition remains viable for the remainder of the portion between 24th Street to 33rd Street, which, UP states, could be served through interchange with OLB at 24th Street. In addition, the 8,400 square foot parcel between 18th Street and 19th Street, which LLC did not seek to acquire, would also be subject to interim trail use. As we noted, that parcel is located just west of the OLB connection and could be available for restored rail service. Thus, portions of the line subject to interim trail use would not be "impossible for use" as a rail right-of-way as in the Belka decision cited by NARPO.

Accordingly, we will deny NARPO's petition to reopen.

This action will not significantly affect either the quality of the human environment or conservation of energy resources.

It is ordered:

1. LLC's petition to reopen the December 3 decision setting terms and conditions for sale of the portion of the segment between 19th Street and the west edge of 24th Street is denied.

2. NARPO's petition to reopen the NITU served September 24, 1997, is denied.

3. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary